

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MORANO'S JEWELERS OF FIFTH AVENUE, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1980	:	
through November 30, 1982.	:	

Petitioner, Morano's Jewelers of Fifth Avenue, Inc., 751 Fifth Avenue, New York, New York 10022, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1980 through November 30, 1982 (File No. 800971).

A hearing was scheduled before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 5, 1988 at 9:15 A.M. Petitioner appeared by Jerochim Bergstein. The Audit Division appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

- I. Whether petitioner failed to appear for the hearing and was thus in default.
- II. If petitioner was not in default, whether the case should be continued or stand on the record of the proceedings of January 5, 1988.
- III. If the case is continued, whether the Audit Division should be prohibited from contacting petitioner's out-of-state customers to verify that items purchased were actually shipped to said customers.

FINDINGS OF FACT

1. Petitioner, Morano's Jewelers of Fifth Avenue, Inc., operates a retail jewelry store at 751 Fifth Avenue, New York, New York. It also sells at wholesale.

The Audit

2. A field audit of petitioner's books and records for the period March 1, 1980 through February 28, 1982 was commenced by the New York District Office in April 1983. The examination was conducted as follows:

- a) Gross sales per the general ledger were compared with gross sales per the

Federal income tax returns and the sales tax returns. While there were several discrepancies, they appear to have been explained to the auditor's satisfaction and gross sales as per the three records were treated as reconciled.

b) Petitioner's accountant agreed to the selection of the month of September 1982 as a test period for a test of petitioner's taxable and nontaxable sales. On May 2, 1983, the accountant produced the cash receipts book and United Parcel Service receipts for September 1982. As it appeared from the United Parcel Service records that the merchandise had been shipped out of state, the auditor accepted said records as verifying the claimed out-of-state sales.

c) Petitioner agreed to a tax of \$19,770.06 on furniture and fixtures, leasehold improvements, machinery and equipment and expenses and this aspect of the case is not at issue.

d) On or sometime after September 29, 1983, the auditor was told by his superiors to hold the case in abeyance, as the Department of Taxation and Finance was starting a "Big Ticket Program", whereby out-of-state sales of high priced items such as jewelry and furs were to be tested by mailing verification letters to customers, and audit policy for this program was still being clarified. The purpose of the letters was to determine if the merchandise was actually delivered to the customer out of state and not subject to tax or was picked up by the customer at the retailer's place of business in New York and thus taxable. The notation in the auditor's log states: "Hold per Albany Special Jeweler's Project".

On December 7, 1983, the auditor was advised by his superiors in Albany that third-party verification was in order in this case.

e) On December 15, 1983, the auditor explained to petitioner's accountant that he would again need the sales journal, United Parcel Service records and sales invoices which he had reviewed on May 2nd. The accountant said that he had the books and records in his possession and did not see any problem in showing them to the auditor. They set a new appointment date of January 23, 1984.

f) On January 23, 1984, the auditor and his supervisor returned to the accountant's office and requested the records for September 1982 and also the records for the month of October 1982. They were advised by the accountant that petitioner's attorney had told him that since the records had been reviewed, the accountant should not make them available to the auditor for additional review and that the attorney also said that it was unconstitutional, i.e. an invasion of privacy, to send inquiries to customers. While in the accountant's office, the auditor and supervisor spoke by telephone to Mr. James Nuttal of the District Office Audit Bureau in Albany and were instructed to prepare and issue an assessment disallowing all mail order non-taxable sales for the audit period if the requested records were not made available for review. As petitioner continued to refuse to produce the records, the auditor disallowed the \$3,521,705.00 in out-of-state sales claimed by petitioner on its sales tax returns, resulting in \$285,712.29 in additional sales tax due.

3. The following consents extending the period of limitation for assessment of sales and use taxes were executed by petitioner and the Audit Division:

a) Consent dated June 8, 1983 extending the period of limitation for the taxable period March 1, 1980 through November 30, 1982 to September 20, 1983.

b) Consent dated August 22, 1983 extending the period of limitation for the taxable period March 1, 1980 through November 30, 1982 to December 20, 1983.

c) Consent dated December 8, 1983 extending the period of limitation for the taxable period March 1, 1980 through November 30, 1982 to June 20, 1984.

4. On January 31, 1984 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for \$285,712.29 in tax and \$90,061.36 in interest, for a total of \$375,773.65. A similar assessment appears to have been issued against Joseph Morano, as officer, however, the assessment document relating thereto is not in the record. No claim has been made that Mr. Morano was not a person required to collect tax on behalf of petitioner. A separate assessment was issued against petitioner for \$19,770.06 in use tax (Finding of Fact "2[c]"). This assessment is not at issue herein.

The Hearing

5. A Notice of Hearing was issued to petitioner and to petitioner's representative, Stanley A. Teitler, Esq., on November 30, 1987, notifying them that this matter was scheduled for a hearing before the Division of Tax Appeals on January 5, 1988 at 9:15 A.M.

6. On December 17, 1987, the attorney for the Department of Taxation and Finance wrote to petitioner's representative stating as follows:

"By now I am sure you are aware that the above matter is scheduled for Formal Hearing on January 5, 1988 at 9:15 a.m. We will have until 1:15 p.m. on that day. Any portion of the hearing not concluded by then may resume the next morning at 9:15 a.m.

Should you have any questions, please do not hesitate to contact me."

7. On January 5, 1988 at 9:15 A.M., petitioner appeared by Jerochim Bergstein, an employee of Stanley A. Teitler, P.C., petitioner's representative, who advised the Administrative Law Judge that he had been instructed to make a statement for petitioner on the record. The Administrative Law Judge requested Mr. Bergstein to call his employer immediately, as petitioner could possibly be held in default for failure to proceed. Mr. Bergstein called his office and reported that he was unable to contact Mr. Teitler. Mr. Bergstein acknowledged on the record that Mr. Teitler knew about the proceedings but would not be appearing and had sent him, Mr. Bergstein, in his place.

8. The Administrative Law Judge elected to open the hearing record and after the presentation of the Audit Division's case, accepted Mr. Bergstein's statement. The statement was as follows:

"It is Morano's of Fifth Avenue's contention that this hearing is totally without merit.

There is presently pending a criminal contempt proceeding against our client. Until all criminal proceedings are settled, we cannot allow - we should not allow any

civil liability to be assessed against Mr. Morano. Thank you."

9. In the afternoon following the aforementioned proceedings, Mr. Teitler and Mr. Bergstein appeared at the offices of the Division of Tax Appeals. The Administrative Law Judge then reopened the record for the purpose of taking argument from Mr. Teitler and the Department's attorney as to the status of the proceedings. Mr. Teitler stated that he had sent Mr. Bergstein, a law student and not a member of the New York Bar, to the hearing to make the aforementioned statement for the purpose of obtaining an adjournment. The Department's attorney took the position that the hearing had been completed or, in the alternative, that petitioner had been in default. Petitioner's representative requested that the matter be continued and stated petitioner's position which is condensed below.

Miscellaneous Facts

10. There was no prior hearing in this matter. There was a prehearing conference at the Tax Appeals Bureau after which the conferee initially proposed that the assessment based on out-of-state sales be cancelled. The conferee, however, was overruled by his supervisors.

11. The New York County Grand Jury, conducting an investigation as to possible evasion of sales tax by petitioner for years including at least a portion of the years at issue, issued a subpoena duces tecum against petitioner and Joseph Morano. Although petitioner and Mr. Morano were unsuccessful in quashing or modifying the subpoenas or in obtaining a stay, they nevertheless did not appear and contempt proceedings were commenced. After a considerable amount of litigation in State and Federal courts, petitioner and Joseph Morano were convicted of contempt and were fined \$250.00 and Mr. Morano was sentenced to 30 days incarceration. The conviction was under appeal at the time of the hearing scheduled for January 5, 1988.

SUMMARY OF PETITIONER'S POSITION

12. Petitioner's position is as follows:

- a) That the hearing should be deemed adjourned or continued.
- b) That the audit had been completed and it was improper for the Audit Division to attempt to reopen it by attempting to contact petitioner's customers.
- c) That it would be improper for the Audit Division to contact petitioner's customers to verify sales, as that would imply to the customers that petitioner was guilty of wrongdoing. Mr. Teitler offered to have an independent investigation conducted by a "Big Eight" accounting firm or, in the alternative, by the Audit Division which could take "a small sample of Morano's charge records and corroborate the audit data with appropriate protections for our client".
- d) That there was a prior hearing in this matter which cancelled a portion of the assessment at issue.
- e) That this proceeding should be stayed because petitioner's president, Joseph Morano, should not be placed in the position of having to defend himself and his corporation in a civil tax proceeding when he is a defendant in a criminal matter involving the same transactions. Mr.

Teitler argued that it was very possible "that (Mr. Morano) would have to testify" in this proceeding and he should not be compelled to do so, because he could "jeopardize any rights he may have in a criminal proceeding".

f) That the proceedings are barred by the statute of limitations.

g) That all records are in the possession of the Court hearing the criminal case.

CONCLUSIONS OF LAW

A. That 20 NYCRR 3000.10 provides, in pertinent part, as follows:

"Section 3000.10 Hearings before administrative law judges. (a) Notice. After issue is joined (see § 3000.4[b] of this Part), the administrative law judge unit shall schedule the controversy for a hearing. The parties shall be given at least 30 days' notice of the first hearing date, and at least 10 days' notice of any adjourned or continued hearing date. A request by any party for a preference in scheduling will be honored to the extent possible.

(b) Adjournment, default. (1) At the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown. In the event of an emergency, an adjournment may be granted on less notice. Upon continued and unwarranted delay of the proceedings by either party, the administrative law judge shall render a default determination against the dilatory party.

(2) In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the administrative law judge shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear.

(3) Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case."

B. That while Mr. Bergstein was employed by the professional corporation which represented petitioner, he himself was not one of the persons enumerated in Tax Law § 2014 or 20 NYCRR 3000.2 and was not qualified to appear on behalf of a petitioner.

C. That petitioner's representative did not ask for an adjournment but deliberately chose not to attend the hearing and sent, in his place, an employee who was not qualified to act as representative. Petitioner was thus in default. As the Findings of Fact show, once the Audit Division sought to verify that items sold were actually shipped out of state, petitioner and petitioner's principal failed to cooperate. They also refused to cooperate with the New York County Grand Jury and its investigation of petitioner's business practices. While the tactics of petitioner's representative may be effective in criminal proceedings, where the State must prove guilt beyond a reasonable doubt, they are not to be countenanced in a civil tax case. Here, petitioner bears the burden of proof and should not be permitted to shift that burden by failing to cooperate. It is noted that petitioner has shown neither an excuse for the default nor a

meritorious case.

D. That the petitioner is hereby found to be in default. All other issues are moot¹.

E. That the petition of Morano's Jewelers of Fifth Avenue, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 31, 1984 is sustained.

DATED: Albany, New York
May 12, 1988

/s/
ADMINISTRATIVE LAW JUDGE

¹As noted in Finding of Fact "10", there was no prior hearing in this matter. A proposed decision of a conferee in the former Tax Appeals Bureau was always subject to supervisory review (Thomas & Betts Corporation, State Tax Commn., September 21, 1984.)